

Page 1

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 - - - - - x

4 SECURITIES INVESTOR PROTECTION

5 CORPORATION

6 v. CASE NO. 08-01789-smb

7 BERNARD L. MADOFF INVESTMENT

8 SECURITIES, LLC, et al.,

9 Debtors.

10 - - - - - x

11 IRVING H. PICARD, TRUSTEE,

12 Plaintiff,

13 v. CASE NO. 09-01161-smb

14 KINGATE GLOBAL FUND,

15 LTD., et al.,

16 Defendants.

17 - - - - - x

18 IRVING H. PICARD, TRUSTEE,

19 Plaintiff,

20 v. CASE NO. 10-04946-smb

21 GOLDENBERG,

22 Defendants.

23 - - - - - x

24

25

Page 2

1 U.S. Bankruptcy Court  
2 One Bowling Green  
3 New York, New York

9       B E F O R E :

10      HON. STUART M. BERNSTEIN

11      U.S. BANKRUPTCY JUDGE

12

13      ECRO: Unidentified

Page 3

1 Conference re: Madoff Day 2 Deposition Topics  
2  
3 Discovery Conference Pursuant to Local Bankruptcy Rule  
4 7007-1  
5  
6 Conference regarding status of factual stipulation in  
7 advance of motions for summary judgment  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25 Transcribed by: Sherri L. Breach, CERT\*D-397

Page 4

1 A P P E A R A N C E S :

2 BAKER & HOSTETLER, LLP

3 Attorneys for BLMIS, Trustee

4 45 Rockefeller Plaza

5 New York, NY 10111

6

7 BY: GERALDINE E. PONTO, ESQ.

8 MARSHALL J. MATTERA, ESQ.

9 DAVID J. SHEEHAN, ESQ.

10 STACEY A. BELL, ESQ.

11 AMANDA E. FEIN, ESQ.

12

13 CHAITMAN, LLP

14 Attorneys for large group of defendants

15 465 Park Avenue

16 New York, New York 10022

17

18 BY: HELEN DAVIS CHAITMAN, ESQ.

19

20 McDERMOTT, WILL & EMERY, LLP

21 Attorneys for Sage defendants

22 340 Madison Avenue

23 New York, New York 10173

24

25 BY: ANDREW B. KRATENSTEIN, ESQ.

Page 5

1 SKADDEN ARPS SLATE MEAGHER & FLOM, LLP

2 Attorneys for Tremont

3 Four Times Square

4 New York, New York 10036

5

6 BY: SETH M. SCHWARTZ, ESQ.

7

8 SCHULTE ROTH & ZABEL, LLP

9 Attorneys for Picower Parties

10 919 Third Avenue

11 New York, New York 10022

12

13 BY: MICHAEL KWON, ESQ.

14

15

16

17

18

19

20

21

22

23

24

25

1 P R O C E E D I N G S

2 THE COURT: Let's do the Goldenberg matter first.

3 MR. SHEEHAN: Your Honor, David Sheehan for the  
4 trustee. I've been advised by Mr. Murphy that late last  
5 evening they were able to reach a stipulation which will be  
6 shortly filed with the Court. And so they would  
7 respectfully request that the matter be adjourned today.

8 THE COURT: What's the next date that you have?

9 MR. SHEEHAN: I don't have one.

10 THE COURT: You don't? August 23rd.

11 MR. SHEEHAN: Thank you, Your Honor.

12 THE COURT: Let's do the Kingate matter next.

13 (Pause)

14 THE COURT: Who wrote the first letter?

15 MR. MATTERA: I did, Your Honor. Marshall Mattera  
16 for the trustee. And I'm here with my colleague, Geraldine  
17 Ponto.

18 THE COURT: How do you do? You have the floor.

19 MR. MATTERA: Good morning, Your Honor. We're  
20 here today because we wrote a letter to the Court requesting  
21 a conference regarding a discovery dispute in the adversary  
22 proceeding, Picard versus Ceretti, which is adversary  
23 proceeding 09-01161-smb.

24 The trustee served non-party, Tremont Group  
25 Holdings, with a Rule 45 document subpoena on June 7th,

Page 7

1       2016. The trustee has been trying in good faith to reach a  
2       consensual resolution for over a year, but has now  
3       determined that it cannot obtain compliance with certain  
4       requests in that subpoena. Those requests are numbers one  
5       through four and seven through eight of the subpoena which  
6       is attached as Exhibit B to the trustee's letter.

7                 The requests seek Tremont's communications and  
8       other documents concerning key players that are specific to  
9       the operation and management of the Kingate Funds, which are  
10      the defendants in this proceeding.

11                 This information will bear on the Funds' state of  
12      mind and business relationships, including the element of  
13      actual knowledge that this Court has addressed in its order  
14      substantially denying the Funds' motion to dismiss.

15                 Tremont persists in challenging relevance, but  
16      it's indisputable that Tremont has relevant and responsive  
17      information. Tremont was co-manager of the defendant,  
18      Kingate Global, for over a decade. Tremont's founder,  
19      Sandra Manzke, introduced Ceretti and Grosso to Madoff and  
20      then served on Defendant Kingate Global's board of directors  
21      for ten years while she was also an officer at Tremont.

22                 Tremont also has asserted that its productions  
23      eight years ago contained documents responsive to the search  
24      terms that the trustee has proposed in this proceeding.

25                 However, those productions were in response to a

Page 8

1 Rule 2004 subpoena issued toward the outset of the trustee's  
2 investigation. The productions were in response to  
3 different requests and were produced using search terms that  
4 are different to the search terms the trustee has proposed  
5 here which are specific to this proceeding.

6 Tremont also has objected that it lacks the  
7 resources to comply with this subpoena, but it has provided  
8 no information to substantiate this claim.

9 Nevertheless, over the past more than a year the  
10 trustee has proposed numerous compromises which would have  
11 eliminated the burdens Tremont has complained of. As to  
12 electronic documents the trustee proposed to further narrow  
13 its already narrow search terms. The trustee also proposed  
14 to exchange discovery related technical information with  
15 Tremont to control costs. The trustee even offered that  
16 Tremont could produce all documents responsive to these  
17 narrow search terms and the trustee would review those  
18 documents subject to a claw back arrangement.

19 In response, Tremont has rejected these  
20 compromises and offered none of its own. Tremont agreed to  
21 run the further narrowed list of search terms resulting in  
22 approximately 50,000 electronic documents, but Tremont  
23 refuses to produce any documents unless the trustee pays its  
24 vendor costs of production and \$500,000 that it estimates  
25 will be the cost of its own attorneys to review for

1 responsiveness and privilege prior to production.

2                   Under the trustee's proposals these costs would  
3 have been entirely unnecessary. As to privilege, there are  
4 adequate protections available to Tremont that would address  
5 this concern. There are the protective orders in this case  
6 that have claw back provisions and other protections.  
7 There's a claw back provision in Rule 45, and the trustee  
8 even offered to negotiate a claw back arrangement that would  
9 address any remaining concerns as to this issue.

10                  As to responsiveness, that review that Tremont  
11 insists that it conduct itself is also unnecessary. The  
12 terms that the trustee has proposed track the requests and  
13 these search terms are agreed upon, and the trustee offered  
14 to do the review itself.

15                  As to Tremont's hard copy documents, it has stated  
16 that it has approximately 1,200 boxes of documents that are  
17 potentially relevant and responsive to the trustee's  
18 requests. The trustee also offered to review those  
19 documents at their physical location at the trustee's  
20 expense. Tremont rejected that compromise, too, without  
21 offering any compromise of its own.

22                  The trustee also proposed that this be resolved by  
23 the discovery arbitrator. Tremont refused to consent.

24                  Therefore, the trustee intends to move for an  
25 order compelling Tremont to produce documents responsive to

1 the requests.

2 THE COURT: Thank you.

3 MR. SCHWARTZ: Good morning, Your Honor.

4 THE COURT: Good morning.

5 MR. SCHWARTZ: Seth Schwartz for Tremont.

6 As we set forth in our letter Tremont does not  
7 have resources to do these searches.

8 THE COURT: Is that what the issue is, resources  
9 as opposed to relevance or something else?

10 MR. SCHWARTZ: Oh, it's relevance, too. But, I  
11 mean, it's -- when you're doing the burden analysis one of  
12 the factors, of course, is resources. Another factor is is  
13 it worth the money to go after all this stuff when you're  
14 going to turn up something that's totally irrelevant anyway.

15 Now we -- Tremont litigated these cases for many,  
16 many years and the issue in all these cases is the same,  
17 what did Tremont know about Madoff. And the issue as I  
18 understand it --

19 THE COURT: Well, it's a little different here.

20 It's what did Kingate know about --

21 MR. SCHWARTZ: Right.

22 THE COURT: -- Madoff.

23 MR. SCHWARTZ: Exactly.

24 THE COURT: And how the communications -- I would  
25 think that due diligence that was conducted on Madoff,

Page 11

1 communication -- which may have been produced already,  
2 communications between Tremont and Kingate or some of these  
3 other advisors relating to investments would certainly be  
4 relevant. I don't know if they were part of the prior  
5 production.

6 MR. SCHWARTZ: Well, when we were working things  
7 out with Mr. Picard's lawyers way back when we turned over  
8 everything that we had relating to Tremont's due diligence  
9 on Madoff. And --

10 THE COURT: Okay.

11 MR. SCHWARTZ: -- if there were anything that had  
12 the name Kingate on it in connection with that due diligence  
13 it was produced or would have been produced.

14 The -- in theory it seems to make sense that there  
15 might be communications between Tremont and Kingate relating  
16 to Madoff that bear on Kingate's knowledge of Madoff. But  
17 the reality is that even though not only Tremont was co-  
18 manager and, in fact, it was not -- it didn't do -- it  
19 wasn't investigated by a search of Kingate. It was  
20 effectively raising assets for the manager of Kingate and  
21 had no role in the oversight of investments in Kingate. It  
22 was essentially a mechanism for Tremont to place assets with  
23 a Madoff feeder fund in the event its own (indiscernible)  
24 funds ran out of capacity to invest directly with Madoff.

25 And Tremont and Kingate were effectively

Page 12

1 competitors and they didn't talk shop about Madoff. They  
2 zealously guarded whatever they knew and were not interested  
3 in sharing that kind of information.

4 And I can -- Your Honor, if there were such  
5 information it was called for again when we were directly  
6 negotiating with Mr. Picard's lawyers. And if anything like  
7 that existed it would have been produced. It would have  
8 been well within the search parameters that were done years  
9 ago. And we've literally over the course of the years  
10 turned over everything that Tremont has that's directly  
11 relevant to due diligence, the communications relating to  
12 Madoff, and we have no reason to believe that there's  
13 anything else out there that truly is relevant that hasn't  
14 already been produced.

15 And during the course of these -- this year-long  
16 meet and confer that we've had, we've essentially begged  
17 counsel to explain to us specifically what kinds of  
18 documents that they haven't already seen that you think we  
19 have that would be relevant. And, you know, we don't get a  
20 response to that. We just get search terms.

21 So we went along with that and we did these  
22 searches and we came up with thousands and thousands of  
23 hits, again, without any reason to believe that any of them  
24 are relevant.

25 Now I happened to bring with me today just a

Page 13

1 couple of e-mails that are representative of what you get  
2 when you get these searches. And on the face of them you  
3 can see they have -- they're basically innocuous  
4 communications that have nothing to do with -- I'm sure have  
5 nothing to do with the issues in the case against Kingate.

6 So when you look at the lack of relevance, the  
7 lack of potential relevance, the extraordinary cost  
8 involved, it seems to me that if plaintiff could come up  
9 with a specific list of documents that they don't think they  
10 can get from Kingate that Tremont would have, then we would  
11 have something to talk about. But otherwise it's just a  
12 classic fishing expedition.

13 THE COURT: Well, one of the -- I mean, I'm not  
14 going to tell you you can't make a motion to compel  
15 discovery. Another way to do it is to identify a hundred  
16 documents. You produce them, I'll look at them and if it  
17 looks like this is just a fishing expedition and you still  
18 want them, you'll pay for it, I guess.

19 But if you're going to make the motion and you're  
20 going to make an argument that you just made, I need a  
21 factual record for that, particularly if there's going to be  
22 cost shifting. I need a factual record for that regarding  
23 ability and things like that.

24 So you can go ahead and make your motion and I'll  
25 deal with it in that manner.

Page 14

1 Okay.

2 MR. SCHWARTZ: Thank you, Your Honor.

3 MR. MATTERA: Thank you, Your Honor.

4 THE COURT: The Madoff day two deposition topics.

5 (Pause)

6 THE COURT: How are you?

7 MS. CHAITMAN: Helen David Chaitman, Your Honor,  
8 on behalf of the large group of defendants.

9 We are anxious to set a date for Mr. Madoff's  
10 continued deposition. It is not practical to hold off  
11 taking that deposition until we review this massive set of  
12 new documents which could -- it could take us a year to get  
13 through that. So I don't -- given Mr. Madoff's health and  
14 his age, I think it's important that we take the deposition.  
15 And if it turns out that we discover documents in these new  
16 productions which will require questioning of Mr. Madoff and  
17 he's still available, we'll have to come back to you and  
18 seek permission.

19 THE COURT: So you -- you're proposing to separate  
20 the discovery issue from the continued deposition because  
21 they were tied together last time?

22 MS. CHAITMAN: Right. But the -- now that the --  
23 the trustee has now served a --

24 THE COURT: Let me ask if the trustee has any  
25 objection to that procedure?

Page 15

1 MR. SHEEHAN: No, Your Honor.

2 THE COURT: Okay. So let's talk about the day two  
3 topics right now. Let's get that out of the way and then  
4 we can deal with the discovery issue separately.

5 MR. SHEEHAN: Sounds good.

6 THE COURT: So what's the issue with the day two  
7 topics?

8 MS. CHAITMAN: Well, are you asking me?

9 THE COURT: I'm --

10 MS. CHAITMAN: From our perspective there were --  
11 what Your Honor had previously indicated was that individual  
12 attorneys would be able to pose questions that are specific  
13 to their clients.

14 THE COURT: Yeah. But I remember and I think it  
15 was Ms. Nevel who stood up and wanted to ask follow up  
16 questions regarding day one topics. And, you know, we  
17 talked about that this was -- you were basically  
18 representing the defendants who were still in there for the  
19 purpose of deposition because everybody couldn't come into  
20 the prison --

21 MS. CHAITMAN: Correct.

22 THE COURT: -- and do the deposition. So I'm not  
23 inclined to continue the day one deposition.

24 The day two deposition I thought I had intended  
25 that if people had specific questions about that -- who were

Page 16

1 still involved, if they had specific questions about their  
2 accounts or, you know, I guess if he had knowledge of their  
3 accounts they could ask about it. It doesn't sound --

4 MS. CHAITMAN: The only --

5 THE COURT: -- like it's going to be a terribly  
6 long deposition.

7 MS. CHAITMAN: The only exception I would ask for,  
8 Your Honor, is that as you may recall the trustee, pursuant  
9 to Magistrate Judge Moss's January 7th, 2017 order has  
10 produced about 500 reels of microfilm documents and some of  
11 those are very, very important, and I would like the  
12 opportunity because those were produced in April and I  
13 didn't have the opportunity to question Mr. Madoff about  
14 them. I would like to be able to question him at least  
15 about those. I mean, I --

16 MR. SHEEHAN: I have no objection, Your Honor.

17 THE COURT: All right. Fine.

18 MS. CHAITMAN: Okay.

19 THE COURT: And then the only other issue I think  
20 that came up were these 302 reports?

21 MR. SHEEHAN: Yes. And we agree with the  
22 examining on those. So --

23 THE COURT: All right. So those are -- it sounds  
24 like the three --

25 MR. SHEEHAN: I think those are the three areas

Page 17

1 that you're --

2 MS. CHAITMAN: The only thing I would ask on the  
3 302, it's a heavily redacted --

4 THE COURT: I saw it. You know what, it doesn't  
5 mean anything to me.

6 MS. CHAITMAN: Yeah, because it's so redacted.

7 THE COURT: But if you want to ask him about it,  
8 it sounds like it's going to be about five minutes of  
9 questioning.

10 MS. CHAITMAN: But is there a way, Your Honor, to  
11 get the complete report?

12 THE COURT: That's an issue involving the  
13 Department of Justice.

14 MS. CHAITMAN: Okay, because clearly it's not an  
15 admissible document in its present form.

16 THE COURT: I agree with you on that. I don't  
17 know what you're going to ask him about it, but people seem  
18 to want to ask him about it. So I suppose you can ask him  
19 what he said to the FBI.

20 MS. CHAITMAN: Mr. Sheehan did that already --

21 THE COURT: Yeah. I saw --

22 MS. CHAITMAN: -- in the last deposition. He went  
23 into great length about it, but he didn't have the heavily  
24 redacted 302. But I --

25 THE COURT: No.

Page 18

1 MS. CHAITMAN: -- I've -- I find it objectionable  
2 to --

3 THE COURT: Well --

4 MR. SHEEHAN: Your Honor, if it was unredacted  
5 would -- I apologize for interrupting.

6 THE COURT: I'm sorry.

7 MR. SHEEHAN: I'm sorry.

8 THE COURT: You know, at best I guess an  
9 unredacted document would set -- first of all, I'm assuming  
10 it's admissible because it's an official report. I don't  
11 know. Obviously, I'm not ruling on it. But, you know, if  
12 the document said Madoff said X, and Madoff says, I never  
13 told these guys that, you know, I don't know where that  
14 leaves us.

15 But, look, you can ask him about it.

16 MR. SHEEHAN: I understand that, Your Honor. The  
17 reason I asked the question is that we asked obviously for  
18 the complete document. The U.S. Attorney, for its own  
19 reasons undisclosed to us, decided that it didn't want to do  
20 that and gave us those portions of it which they felt  
21 directed, you know, to the issue of 1992 that --

22 THE COURT: Is there a procedure by which you can  
23 compel the production?

24 MR. SHEEHAN: We did go through that procedure.

25 It's called filing a certain letter or whatever. The reason

Page 19

1 I'm asking Your Honor the question, which realize  
2 respectfully, is that if we can go back to the U.S. Attorney  
3 and say, look, we're going to have trouble with admission  
4 here unless we have a full document that both adversaries  
5 and the Court can examine, maybe I can convince them at that  
6 point because I'll be candid, Your Honor. I see no real  
7 purpose. The U.S. Government's case as far as I'm concerned  
8 is over. We just settled the two, you know, estates. And  
9 there are no further criminal prosecutions.

10 So I see no reason why it can't be -- and there's  
11 nothing in there that, you know, I could represent it  
12 because I have read it. Ms. Chaitman could also read it in  
13 its entirety. They will allow you to go down and read it,  
14 but they won't let you, you know, copy it or do any of those  
15 things.

16 THE COURT: Well, I mean, that's up to her. But  
17 --

18 MR. SHEEHAN: Right.

19 THE COURT: -- the document itself in that form  
20 would not be admissible.

21 MR. SHEEHAN: Okay.

22 THE COURT: I suppose you could call the agent's  
23 also if they remembered. But --

24 MR. SHEEHAN: No. That thought's occurred to us,  
25 but, you know, we've early on, there's a long history to the

Page 20

1 U.S. Attorney and the trustee, we've asked in the past for  
2 the assistance of the FBI and that's been denied to us  
3 because of, again, pending criminal prosecutions and they  
4 don't want to in any way potentially corrupt their  
5 investigation or their trial.

6 Again, I would be more than happy to call, you  
7 know, the two agents, Mr. Kelley and his colleague.

8 THE COURT: Anybody can testify to what Mr. Madoff  
9 told them, I suppose, on an issue that's relevant.

10 MR. SHEEHAN: It's an admission.

11 THE COURT: Well, it's an admission by the estate.

12 MR. SHEEHAN: Yeah. Right.

13 THE COURT: Okay. All right. So the three  
14 topics, general areas are the 302s, follow up questions on  
15 specific accounts of the people who are still in it, and  
16 this -- these 400 reels or whatever the number is --

17 MS. CHAITMAN: The documents --

18 THE COURT: -- or something in there. Right.

19 MS. CHAITMAN: -- that have just been -- yeah.

20 THE COURT: Anything else?

21 MR. KRATENSTEIN: No, Your Honor.

22 THE COURT: All right. So why don't you just  
23 provide the usual order, with Picower out, and listing the  
24 topics.

25 MR. SHEEHAN: All right.

Page 21

1 MS. CHAITMAN: Okay.

2 THE COURT: Okay.

3 MR. SHEEHAN: Thank you, Your Honor.

4 THE COURT: Now let's deal with the discovery for  
5 a minute.

6 You know, one of my concerns about discovery in  
7 these cases is every time I had a hearing I get a little  
8 more information, pre-existing information the next time I  
9 have a hearing.

10 From what I've read, although it was in a  
11 different adversary proceeding, Mr. Moss dealt with the  
12 issue of the production of these 4,700 boxes I thought and  
13 said to you, Ms. Chaitman, why don't you look at the list  
14 and see if you can pull out what it is that you propose.

15 MS. CHAITMAN: Here's the problem, Judge. We just  
16 got with the July 14th data this 183 --

17 THE COURT: Yeah.

18 MS. CHAITMAN: Yeah. Okay. So --

19 THE COURT: So that's the universe of the 4,700  
20 boxes we're talking -- oh, 5,300 boxes, whatever the number  
21 is.

22 MR. SHEEHAN: What that represents, that exhibit,  
23 is the 5,300 tapes.

24 THE COURT: Of tapes. Okay.

25 MS. CHAITMAN: Okay. So the thing that's hard,

Page 22

1 Judge, is that we had a conference call yesterday with three  
2 people from Baker & Hostetler, Mr. (indiscernible), and we  
3 asked questions about this document which we had not seen  
4 before this letter.

5 And this was done by we were told an outside  
6 vendor. So if a tape is labeled something by an outside  
7 vendor who is not knowledgeable about the case, who is not a  
8 lawyer, I don't feel comfortable simply relying upon that  
9 and making a decision which could impact my clients' --

10 THE COURT: Uh-huh.

11 MS. CHAITMAN: -- lives so significantly. I  
12 really feel that we need to go through these documents and,  
13 you know, some of them -- look, obviously, some of them have  
14 now been produced pursuant to Magistrate Judge Moss's order.  
15 But the vast majority have not.

16 THE COURT: Right.

17 MS. CHAITMAN: And I think clearly we're entitled  
18 to these documents. These are documents that should have  
19 been posted in the e-data room from inception. They should  
20 have been provided to Mr. Davinski (ph) along with a check  
21 for \$30 million so that the trustee's contention throughout  
22 this case that Madoff never purchased securities for any of  
23 the investors or advisory customers could have been tested  
24 against the facts.

25 You know, with -- Mr. Picard has based his claims

Page 23

1 upon this fundamental fact. He has led us all to believe  
2 that the e-data room contained the entire universe of  
3 documents --

4 THE COURT: I know the history. As I understand  
5 it, the dispute is who is going to pay for this. The  
6 trustee doesn't -- the trustee would produce this stuff, but  
7 you would have to go and look at it at your own -- on your  
8 own dime, on your own time. That's what they're --

9 MS. CHAITMAN: Yeah. Okay.

10 THE COURT: Is that a fair approximation, Mr.  
11 Sheehan, of the trustee's position?

12 MR. SHEEHAN: Your Honor, essentially that's part  
13 of it, but I would like to be heard. I --

14 THE COURT: Yeah.

15 MR. SHEEHAN: -- don't want to interrupt here.

16 THE COURT: Okay.

17 MS. CHAITMAN: Okay. When I was here last time,  
18 Judge, I had no idea -- we hadn't been provided with this  
19 document which we learned last night --

20 THE COURT: Okay.

21 MS. CHAITMAN: -- has been in existence for --

22 THE COURT: Okay. So now you have it. What --

23 MS. CHAITMAN: -- since 2010.

24 THE COURT: -- do you propose to do with it?

25 MS. CHAITMAN: Well, look, if you say that I can

Page 24

1 only have these documents if I pay for them, I can't get the  
2 documents. I don't represent SiPC. I don't have the  
3 capacity to --

4 THE COURT: I understand.

5 MS. CHAITMAN: -- to get --

6 THE COURT: I understand the financial difference  
7 --

8 MS. CHAITMAN: So --

9 THE COURT: -- which is one consideration.

10 MS. CHAITMAN: So basically the trustee who from  
11 day one has taken a factual position no security was ever  
12 purchased for investment advisory customer and when I asked  
13 for documents which proved that, he didn't tell me he had  
14 these documents. And now seven and a half years after he  
15 filed suit we realize all these documents exist and he's  
16 saying, I can have them if I come up with \$2 million.

17 THE COURT: Okay.

18 MS. CHAITMAN: I can't. So, you know, at some  
19 point I'm going to ask for a dismissal of the adversary  
20 proceeding. But right now I'm entitled to the documents and  
21 I think the trustee who has been funded to the tune of a  
22 billion dollars in legal fees can certainly afford to have  
23 SiPC pay \$2 million or Baker & Hostetler can afford it if  
24 that's what's necessary.

25 THE COURT: All right. Let me hear from Mr.

Page 25

1 Sheehan.

2 MR. SHEEHAN: Your Honor, I would like to harken  
3 back to something you just said a moment ago and that is  
4 that as we -- as we delve more deeply into this we seem to  
5 be reversing history and looking at it (indiscernible) end  
6 of the funnel. And you start narrowing the spans.

7 If you give me a moment I think I would like to  
8 comment on that because I think it leads to some of the  
9 allegations that are made in the -- against the trustee  
10 which are ill-founded as well as the fact that it ignores  
11 what normally takes place in all of these cases.

12 And I can use the history of the tapes as an  
13 example of how that happens. As Your Honor well knows we  
14 arrived. We've talked about this before. We start  
15 exploring and we hire really talented people from Alex and  
16 FTI to look at it. And that addresses one of the concerns  
17 just expressed by Ms. Chaitman. Lawyers didn't look at it.  
18 Well, to a certain extent that's correct. That doesn't mean  
19 lawyers never looked at any of it. Of course they did.  
20 They filed the complaints. They looked at these documents.

21 But if you're going to search microfilm and  
22 there's 5,300 reels of this and it's not exactly the easiest  
23 thing in the world to do, it cost us, you know, a lot of  
24 money to just restore those 200.

25 THE COURT: When you say restore, that -- I'm not

Page 26

1 understanding the technology.

2 MR. SHEEHAN: Okay. What that means is, is that

3 --

4 THE COURT: You have films and as I said the last  
5 time --

6 MR. SHEEHAN: Right.

7 THE COURT: -- 50 years ago when I went to the  
8 library you put the film in the machine and you roll the  
9 crank and you looked at it.

10 MR. SHEEHAN: And if you had 10,000 minions doing  
11 that you might make your way through it.

12 THE COURT: So what do you mean by restore?

13 MR. SHEEHAN: Well, what we do is we actually  
14 restore it to a digitized state. In other words, it's now  
15 digital. It's searchable. Right. And --

16 THE COURT: So why do you have to do that?

17 MR. SHEEHAN: Why do we have to do that? Because  
18 then you don't have to sit there and go like this. You can  
19 put search terms into it. And e-discovery, if we were to  
20 produce the 19,000 bits of media, you know, we're probably  
21 talking hundreds of terabytes of data here. And I don't  
22 know how you would ever in a lifetime sit down and read all  
23 of those.

24 THE COURT: But if she wants to look at it --

25 MR. SHEEHAN: Why don't we -- can I --

1 THE COURT: Yeah.

2 MR. SHEEHAN: -- continue, Your Honor? I think I  
3 have an answer to that. I understand Your Honor's concern.  
4 I want to try to address it. All right.

5 So what happens is, is that we get in there and  
6 now it's we find these 5,300 tapes in three different  
7 locations. We give Alice the task of first of all creating  
8 this document that Your Honor is now seeing.

9 Now to us that's work product. That's what we've  
10 been working with, et cetera. We utilized that to decide  
11 which tapes we would look at to determine the cash in, cash  
12 out which was our main focus at that point predicated upon  
13 the fact that for the ten years where we did have bank  
14 records and all the other records it was clear that no  
15 securities were being purchased and that this was indeed a  
16 Ponzi scheme.

17 So we focused upon 400 of those tapes. All right.  
18 And those 400 tapes have been in the data room, 400 tapes,  
19 in the data room since 2012.

20 Now Ms. Chaitman says, well, I didn't know about  
21 this. And I understand why she may not have. But if you go  
22 back to our, you know, our rules that we operate under, you  
23 know, the rule is that we have to make initial disclosures.  
24 And if Your Honor will bear with me I would like to read to  
25 you the initial disclosure we made in August 1, 2011: "To

Page 28

1 all" -- you've got realize I'm -- Ms. Chaitman is not the  
2 only defendant here. We have hundreds and thousands of  
3 these people.

4 So it says in the -- this is quoting: "The trustee  
5 has assumed possession of and/or has access in conjunction  
6 with the Federal Bureau of Investigation" -- you realize the  
7 FBI is there with us hand in hand -- "to approximately  
8 11,700 boxes" -- it's not 13. I'll explain that in a minute  
9 --

10 "Of BLMIS paper records in 19,000 media sources  
11 containing electronically stored information, ESI,  
12 which include, but are not limited to, desktop  
13 computers, laptop computers, AS400s, hard drives,  
14 network storage, microfilm, microfiche, backup  
15 tapes, PDAs, floppy discs, compact discs, and  
16 memory cards."

17 So we have preserved all the data. He assumed  
18 possession of it on April 15, 2008.

19 "With respect to these materials some paper and  
20 some ESI are stored in one or more electronic  
21 databases totaling 3.5 terabytes or 27.9 million  
22 documents."

23 Now that's how you start discovery. You don't  
24 start discovery at the back end which is what's happened  
25 here. Someone should have sat down with us from Ms.

Page 29

1 Chaitman's office and said, well, you have all these things.  
2 For us to then spread it out all over when the vast majority  
3 of people would have no interest in it. You're supposed to  
4 go through and say, well, what do you have, what does it  
5 show you, what -- you know, what -- none of that ever  
6 happened. You're -- the reason you're hearing this sort of  
7 through the wrong end of the funnel is because of how we're  
8 approaching it.

9 So if someone had sat down we would have done  
10 that. And what they could have done, all right, is searched  
11 the 400 tapes that were on there since 2012. But for the  
12 longest period of time Ms. Chaitman refused. She considered  
13 the data base a document dump. And that, therefore, she  
14 shouldn't have to go look and that we should just cherry  
15 pick stuff for her and produce it.

16 Well, there are orders entered. There are  
17 protective orders. There's an orderly process to all of  
18 this which she chose and still chooses to ignore. So as a  
19 result we find ourselves here today. Now we can't -- and,  
20 you know, re-going through all of this history.

21 Now let me just finish, if I may.

22 And so what happens is is that we're in front of  
23 Judge Moss and she's been complaining for some time about  
24 trading records. Now trading records I think our letter and  
25 I hope your letter and I want to last make it clear, that

Page 30

1 trading records is a term that requires careful usage and  
2 cannot be just used and bandied about that trading records  
3 show this kind of trading.

4 All right. We have found, I make this statement  
5 flat. All right. We have found no evidence, no evidence  
6 from any third party sources that would substantiate the  
7 fact that any trading took place for customer accounts in  
8 the investment advisory accounts.

9 Now this is with thousands and thousands, the  
10 millions and millions of dollars that our friend, Ms.  
11 Chaitman, is talking about that we spent looking. We had no  
12 preset notion, notwithstanding the outlandish allegation  
13 about the conspiracy with SiPC which I believe Your Honor  
14 has already rejected. But the point is we have no basis  
15 for this. When we find the facts as we find them, it's --  
16 and it's indisputable given all the records that we have  
17 that from back to '98 there is no trading. And there isn't  
18 a record that we've looked at since then that would prove  
19 otherwise.

20 And nothing that Your Honor has been shown to date  
21 by our adversaries proves otherwise, notwithstanding their  
22 protestations to the contrary. And I will address those,  
23 too, if Your Honor will permit me.

24 All right. So what we're looking at is, is so  
25 Judge Moss hears this and he turns to us and says, well, you

Page 31

1 know, are there other trading records, and we say, well,  
2 we'll look and see what's in the microfilm. All right. And  
3 we look and we identify additional 201 that are 1992 or  
4 earlier predicated upon the fact that Madoff's people, when  
5 they created the tape, put on a date and said this is what  
6 it represents.

7 So we did that and looked at it. We gave those  
8 things to her. So since April she's had 600 tapes that she  
9 can search and look at and tell you what's gone on. All  
10 right.

11 So I want to show Your Honor, if I might, and I  
12 have these for my adversary, too. What these are, are  
13 demonstratives if I could just hand them -- a copy of them  
14 up to Your Honor and give them to Mr. Kratenstein and Ms.  
15 Chaitman. Do you want this --

16 UNIDENTIFIED SPEAKER: I can --

17 MR. SHEEHAN: I can come up and --

18 UNIDENTIFIED SPEAKER: I can --

19 MR. SHEEHAN: I need one for the judge.

20 UNIDENTIFIED SPEAKER: Sure. Do you want all five  
21 or do you want the first two?

22 MR. SHEEHAN: No. I want all of them.

23 UNIDENTIFIED SPEAKER: All of them. Okay.

24 (Pause)

25 MR. SHEEHAN: Thank you, Your Honor.

Page 32

1 THE COURT: Thank you.

2 MR. SHEEHAN: So what we did is we tried to break  
3 this down into processed and unprocessed. If anything I  
4 would say we started doing some of Ms. Chaitman's work here  
5 for her, but we're happy to do it. All right.

6 So what you can see in the processed and  
7 unprocessed reports, okay, is that which -- these are the  
8 report types on the left-hand side. All right.

9 THE COURT: What's C&S?

10 MR. SHEEHAN: Cash and securities. Customer  
11 ledger, other, other was a designation by Alex when he  
12 couldn't find, you know, something to call it and they just  
13 called it other, profit and loss, PMR is portfolio  
14 management reports, PMR and other. And so they went through  
15 and they did this analysis, et cetera.

16 Now Your Honor can see that there's the 40 -- the  
17 next column is not processed and you see the identity of the  
18 kind of stuff that's not been processed. It's 4,700. We  
19 look at the processed and you see 602, and you can see the  
20 kind of things that we were producing: Positions, stock  
21 record trading 214, customer ledger 263, cash and securities  
22 45.

23 Now Your Honor can say, well, that's not enough of  
24 a representative sample. But what you'll continue to -- if  
25 you go through this what you'll see is, if you go to the

Page 33

1 next page, is that processed and unprocessed reports by year  
2 on the next page show you that what we did process was  
3 everything from 1992 back which is the focus of our exercise  
4 here because it's been conceded by Mr. Madoff that it didn't  
5 start until 1992.

6 And you can see, therefore, that we thought that  
7 we had produced, you know, between the six -- the 400 --

8 THE COURT: Because you're still contending that  
9 it did start before 1992.

10 MR. SHEEHAN: Oh, absolutely. So -- but this is  
11 -- Ms. Chaitman is suggesting that she wanted records prior  
12 to '92 to show that there was actual trading taking place.  
13 All right. So we gave her all of that. And we didn't give  
14 her any -- you know, so the 4,700 all represent post-1992  
15 documents. All right.

16 Now the next thing we see is, is that these are  
17 the -- the ones for the position, stock record and trading  
18 reports summary. In other words, and this is more readily  
19 seen if we get to the two charts past it, but let me explain  
20 what we're about to look at and that's this, is that there's  
21 a lot of data on these three microfilms, not all of which  
22 would relate to, you know, the idea of whether or not there  
23 was actual trading taking place which as I understand it is  
24 the focus of Ms. Chaitman's inquiry.

25 So what we did is we broke it down into those

Page 34

1 categories that would appear to us to be the ones that are  
2 most interesting to her, and they add up to 1,281. And you  
3 say, well, what does that represent. If you look on the  
4 next page you'll see that we have a pie chart and it says,  
5 position stock record trading unprocessed microfilm reels.  
6 What this represents is if you took all of the pages that we  
7 gave Ms. Chaitman, the 168 pages, and broke it down into  
8 what Mr. Madoff said were on these tapes, this is how it  
9 would break down. They had open long positions, stock  
10 records, et cetera. And these are all the ones and how they  
11 broke down into percentages.

12 And then the next page we took the ones that we  
13 processed and broke that down. And this shows you that we  
14 gave her a very good representative sample of all the  
15 documents that are in there including what we believe to be  
16 the ones that she would be most interested in looking at.

17 So in other words this wasn't just a random  
18 exercise by us. An effort was made by the trustee taking  
19 the records that were available to him to respond very  
20 directly to her statement that she did not get trading  
21 records.

22 Now when we had done all this, this goes back to  
23 Judge Moss and your reference taken earlier, and that is, is  
24 that Ms. Chaitman got the -- you know, we did some -- what's  
25 in the data room at this point by April, okay, and what's

Page 35

1 available to Ms. Chaitman directly. So in the data room is  
2 the 400 tapes that we've put in there back in the early  
3 2000s, or 2011 and '12. It's been there since at least  
4 2012.

5 We ran 147 search terms on that and produced the  
6 documents. And at the time there was no objection. Later  
7 Ms. Chaitman objected to our search terms, added 17 more.  
8 We ran those and gave her those documents. All right. So  
9 those have been from our perspective thoroughly searched by  
10 our search terms and hers.

11 Then what we did is we found the -- those tapes I  
12 was telling you about earlier from '92 back and we processed  
13 those so she could digitally look at them and do her own  
14 search terms, et cetera, and we gave those to her in its  
15 entirety. So now she has that 600 tapes that are shown on  
16 that last pie chart showing a representative sample.

17 So what we're saying here today, this is a long-  
18 winded answer to Your Honor's question. We're not saying  
19 that proportionality means the trustee ahs a lot of money,  
20 she has none, and therefore, you know, we should pay for it  
21 or they should. What we're saying is, is that  
22 proportionality takes place in the context of the discovery  
23 at hand. All right. What are we going to gain by  
24 continuing to look and research and spend money when I think  
25 we've given Ms. Chaitman with the 600 that she has more than

Page 36

1 adequate data to come to Your Honor and then say, I've  
2 looked at this, look at what I've found. Your Honor, you  
3 should allow me to look, if not at all 4,700, at least the  
4 1,281 that the trustee admits has stock record and other  
5 information on it, and I should be able to look at it.

6 I respectfully submit she has not done that. All  
7 right.

8 Now the two things that we've heard about from Ms.  
9 Chaitman, and in her last submission she gave them to us,  
10 was treasuries. It was exclusive information according to  
11 Ms. Chaitman. The treasuries have been known about since  
12 the very beginning. Very early in the case there was a  
13 letter written by Mr. Hardvac (ph), I think it's been  
14 referred to in this room, in which we disclosed to  
15 (indiscernible) that, in fact, over \$16 billion worth of  
16 treasuries were purchased.

17 It's a money business. It's a Ponzi scheme.  
18 Deals in cash. The question is did he buy any of those  
19 treasuries for customers (indiscernible). If you take any  
20 number of Ms. Chaitman's exhibits and compare those to the  
21 703 account at the same time, no treasuries were purchased.  
22 None. Just what we (indiscernible). She can't find those.  
23 All right.

24 Same thing is true with regard to the banks  
25 themselves because she doesn't actually know what's

Page 37

1 (indiscernible) bank and a few other banks where she's said  
2 that's actually happened. We have no correlation there  
3 either. She's not making that correlation. All right.

4 The mere fact that we have treasuries being  
5 purchased is unremarkable. It doesn't mean anything, not  
6 unless she can actually show that they're purchased for a  
7 particular account. And that's going to require a little  
8 more legwork than what Your Honor has before you.

9 Mr. Kratenstein, I don't disagree and that's why  
10 he should be entitled to question Mr. Madoff about it. I  
11 don't object to that at all. But he shows Your Honor  
12 certain stocks that he found in there that were delivered in  
13 by his family using that term broadly. We don't dispute  
14 that either. All right. We found that happened. Everyone  
15 who opened an account with Madoff didn't give him cash.  
16 They gave him stock. And when he got it he liquidated it.  
17 All right. He turned it into cash and then started this --  
18 his efforts.

19 There's no trading that. He's cashing it in. And  
20 we can show that. All right. We can show that that's what  
21 actually happened to those stocks.

22 Now it's going to show up, all right, in DTCC  
23 records and so it looks like there's something actually --  
24 because there was only one DTCC account. That was the one  
25 for the market making and proprietary. He didn't have a

Page 38

1 separate one for investment and advisory. That was a closed  
2 system and no outside world had contact with it. So for him  
3 to then negotiate and sell those stocks that were delivered  
4 in for -- by that customer, they are going to show up. They  
5 -- I don't disagree. They'll show up in DTCC and they'll  
6 show up in the market making records. Why, because --

7 THE COURT: Have the --

8 MR. SHEEHAN: -- there's no other place to  
9 negotiate them.

10 THE COURT: Have the DTCC records been produced  
11 either by DTCC or the trustee?

12 MR. SHEEHAN: Yeah. We produced a number of  
13 those. We -- certainly all the ones that we had going back  
14 to 1998 included in the reference that we've given to Ms.  
15 Chaitman. And I want to be very careful with this date  
16 here. There's a predecessor at DTCC called National  
17 Securities Career Incorporation, NCSS. We have found  
18 records of those.

19 We believe what those are, just to be very clear  
20 here today in court, is that Madoff had access to -- had a  
21 printer in his office and he could print that out. So while  
22 it is a -- I believe an NCSS record, it is actually printed  
23 out in Madoff's office, not delivered by NCSS. I think  
24 that's an important distinction.

25 But in any event, we have produced those records

Page 39

1 as well. So we believe that there's enough -- more than  
2 enough information in the 600 that Ms. Chaitman has, all  
3 right, that she should be able to come to Your Honor with a  
4 lot more information than she's giving to you now, to  
5 justify the expense of taking whether it's 1,281 or 4,500  
6 more tapes and putting those together.

7 Now we're going to accommodate her. We -- Your  
8 Honor suggested the last time we were here, well, just give  
9 her the tapes. And I guess what we could do to make it easy  
10 so she doesn't have to have somebody from Iron Mountain  
11 watch her or any of that stuff, we could just copy the tapes  
12 and give it to her.

13 But I don't know -- and to be candid, and I think  
14 Ms. Chaitman would be right if we gave her that we're giving  
15 her a pig in the poke because at that point how the heck  
16 could she go through 4,500 tapes without them being, you  
17 know, digitized and put in a format to -- that can be looked  
18 at.

19 So I believe what's before Your Honor today and I  
20 think that, you know, especially in light of the Judge Moss  
21 history, it's not a failure on our part to comply with two  
22 prior orders or with Judge Moss's order. We believe and I  
23 believe Judge Moss believed that we have complied with what  
24 he asked us to do. And that what he then suggested to Ms.  
25 Chaitman is, okay, fine, just where we are here today; that

Page 40

1 what you can do is look at the 600 and if you come back to  
2 me and you demonstrate to me that there's reason to be had  
3 that the trustee should incur the further expense of putting  
4 those other tapes together, that's fine.

5           What I would also suggest in adding to that is  
6 that Ms. Chaitman has those 600. She says she wants to go  
7 back and talk to Mr. Madoff. I agree. We should go. We  
8 should go sooner rather than later. And she can utilize  
9 that opportunity to also ask him and then there would be  
10 perhaps even a further record. I submit, anticipate the  
11 argument that Mr. Madoff will have no knowledge of this as  
12 demonstrated by what he was telling us the last time we were  
13 down there. His knowledge of the back office, the trades,  
14 the records and everything is very minimum. And when asked  
15 about it he disavows any real knowledge.

16           So I don't know what we're going to gain, but I'm  
17 more than happy to go down. I'm more than happy to have her  
18 answer. But to suggest today I think -- I think there's no  
19 motion pending to be frank. I think Ms. Madoff -- I  
20 apologize again. I've made that mistake before and I do  
21 apologize. Is that Ms. Chaitman should put together a  
22 motion utilizing those 600 and Mr. Kratenstein can add to  
23 that. And they've heard what I've had to say today. And I  
24 recognize that we've given them a lot of additional data.

25           But I think we've given more than enough to put

Page 41

1 the onus on them to come to Your Honor with a motion that  
2 says, wait a minute, whatever the trustee did here is not  
3 enough. I need the rest of those tapes. And I think at  
4 that point we can respond again, all right, and I'm not  
5 holding anything back here. It's not like I've got more  
6 than I can tell Your Honor. We're very comfortable that  
7 there's nothing on those 600 nor would there be anything on  
8 the 4,500 that will contradict what we're representing and  
9 have represented throughout the course of the case, that  
10 there was no trading going on on the investment advisory  
11 side of the house.

12 Thank you, Your Honor.

13 THE COURT: Okay.

14 MR. KRATENSTEIN: Your Honor, may I be heard?

15 THE COURT: Sure.

16 MR. KRATENSTEIN: Thank you, Your Honor.

17 Good morning, Your Honor. Andrew Kratenstein of  
18 McDermott, Will & Emory for the Sage defendants.

19 I want to start by thanking Mr. Sheehan for  
20 acknowledging that the Sages did, in fact, deliver stock.  
21 That's actually the first time -- to Mr. Madoff. That's  
22 actually the first time we've heard that admission. He also  
23 just said several things just now that I've never heard  
24 before and was very interested to hear. He said that, yes,  
25 they admit that the Sages delivered stock to Mr. Madoff, but

Page 42

1 they can show that Mr. Madoff liquidated the stock and then  
2 started his scheme.

3 I would love to see that evidence. I haven't seen  
4 it yet. Maybe it will help, if you show it to me, resolve  
5 this case, maybe it won't. I don't know. But I would love  
6 to see it sooner rather than later. We certainly haven't  
7 found it.

8 What we have seen, and I attached some of this to  
9 my letter back from the last hearing, are documents that  
10 appear to show from Mr. Madoff's records and we did try to  
11 make the showing to show what we were finding in this  
12 microfilm, that (a) stocks were delivered to Mr. Madoff back  
13 in the late '70s by my clients. That's now apparently  
14 admitted. And that stocks were held according to Mr.  
15 Madoff's records at least for some period of time at  
16 different banks including National Westminster Bank and  
17 MBNA, stocks or other securities including an RCA bond.

18 And if the trustee has evidence showing that those  
19 records of Mr. Madoff's are inaccurate and that, in fact,  
20 those positions were liquidated before the Sages gave the  
21 instructions to liquidate them later in time, I would love  
22 to see it. Show it to us as soon as possible and maybe that  
23 could help streamline this whole matter.

24 I will note that we do have a defense that  
25 regardless of whether the trades actually occurred, the mere

Page 43

1 fact that the Sages directed the trading is a defense, but  
2 put that aside it would also obviously be interesting for us  
3 to know if the trades actually occurred or not.

4 And so we've been trying to figure that out  
5 through all of the records that have been produced and it is  
6 difficult to do. There are tons and tons of records that  
7 have now been produced.

8 The other thing we can't -- and we just got these  
9 pie charts and other charts which, again, I wish I had seen  
10 before this morning so that we could study them. But, for  
11 example, talking about those cash and securities records  
12 that were on that list, we have done our review of those.  
13 We think that they're very interesting records. We have  
14 only found them at what has been produced for the house 17.  
15 We have investment advisory accounts through 1985.

16 And we -- maybe they exist beyond that and maybe  
17 they don't. We're curious as to why. That's one of the  
18 reasons we think that the production is incomplete. It's  
19 unclear to us why there are no post-1985 cash and securities  
20 reports for the house 17 account. And we have questions  
21 about that.

22 Turning to proportionality, you know, I will just  
23 quickly take to the factors here. We have already addressed  
24 resources. The importance of the issues at stake in this  
25 action, as Your Honor knows the importance is, is quite

Page 44

1 large. There's also a public side of this, obviously, what  
2 happened with Mr. Madoff, what was the scope of the fraud,  
3 et cetera.

4 The amount of controversy from my clients at least  
5 this case involves their life savings. So that's certainly  
6 to them a very high amount of controversy.

7 In terms of the access to the data, the trustee  
8 has all the access. We only have access to what we have  
9 been given.

10 Resources, we've already discussed, and the  
11 importance of the discovery to resolving the issues in this  
12 case, we do think it's very important for the reasons that I  
13 just said and also because as Ms. Chaitman eluded to, when  
14 the trustee puts forward a \$30 million expert and says,  
15 there is no evidence and my case -- their case is based on  
16 an absence of evidence of real trading, then it's really  
17 incumbent on them to make available to the defendants all of  
18 the evidence.

19 And for them to say, well, we have to define what  
20 is a trading record and what isn't, as I believe my  
21 colleague, Mr. Hutmaker (ph) said at the last hearing to  
22 you, what is a trading record and what isn't, what counts  
23 and what doesn't, that's for the fact finder. It's not for  
24 the trustee to say, well, there's no third party  
25 verification so you should disregard it. That will be for

Page 45

1 the fact finder to decide what credence to give to Madoff  
2 records or other records. And if Mr. Sheehan and his  
3 colleagues want to prove that these are fake accounts or  
4 dummy accounts or what have you and that they can show us  
5 through DTCC or other records that these stock trades never  
6 occurred or the stock was liquidated, they'll have every  
7 opportunity to do that. But we think we need to see the  
8 documents so that we can test their assertions.

9 Thank you, Your Honor.

10 THE COURT: All of the documents, all 4,700 boxes?

11 MR. KRATENSTEIN: Well, now that we've seen this,  
12 you know --

13 THE COURT: What's this?

14 MR. KRATENSTEIN: Well, I'm sorry. The records  
15 that have been produced it is possible that we may be able  
16 to narrow that. We hadn't seen this breakdown that we got  
17 until this morning. I was going to come in here this  
18 morning and say, yes, because we just got this chart here  
19 and for my clients at least, my clients bought and held  
20 securities so they were not switched right to begin. The --  
21 and the Sages (indiscernible) account they bought and held  
22 securities between 1982 approximately and 2007. Okay.

23 So that's a long period of time and we need the  
24 records of that entire period of time to see what happened  
25 to those securities, if anything. And, again, if they have

Page 46

1 the documents that they say prove beyond a shadow of a doubt  
2 or whatever evidentiary standard you want to apply that they  
3 -- that it didn't occur, or preponderance of the evidence,  
4 whatever. Here's the evidence showing that these trades  
5 didn't occur, here's the evidence showing what Mr. Sheehan  
6 just said that they were liquidated and assumes the stocks,  
7 give it and then show it to us.

8 THE COURT: Your clients were giving trading  
9 instructions to Madoff.

10 MR. KRATENSTEIN: Yes. In fact, I'll -- my letter  
11 which was dated July 20 -- June 26th rather, if you look at  
12 Exhibit C, that's an evidence of one of the instructions.

13 (Pause)

14 THE COURT: I'm sorry. What tab is that?

15 MR. KRATENSTEIN: I don't --

16 THE COURT: Oh.

17 MR. KRATENSTEIN: It's Exhibit C of my June 26th,  
18 letter.

19 (Pause)

20 MR. KRATENSTEIN: I'll --

21 THE COURT: I'm looking for it.

22 MR. KRATENSTEIN: Yeah.

23 THE COURT: How frequently did your client give  
24 trading instructions to Madoff?

25 MR. KRATENSTEIN: My client gave trading

Page 47

1 instructions -- he met with Madoff at least once a year or  
2 more. There are more letters like this. There are at least  
3 a half dozen that we found. He regularly gave trading  
4 instructions. It would depend on the time. So they bought  
5 securities, as I said, in the early '80s on their  
6 instructions and there was a buy and hold strategy mostly,  
7 but certain positions were changed over time at the  
8 direction of the Sages.

9 THE COURT: Did the trades that the Sages were  
10 instructing show up on the customer statements?

11 MR. KRATENSTEIN: They did.

12 THE COURT: All right. Now you're in a different  
13 position than the usual investment advisory customer who  
14 gave him trading discretion. I understand.

15 MR. KRATENSTEIN: Yes, Your Honor.

16 THE COURT: All right.

17 MR. KRATENSTEIN: Thank you.

18 THE COURT: Yeah.

19 MS. CHAITMAN: Judge, I won't take the time to  
20 refute everything that Mr. Sheehan said, but I -- we have  
21 made extensive use of the e-data room. We had no knowledge  
22 that the 400 reels of documents were -- that were put in the  
23 data room came from the reels. We just looked at the e-data  
24 room. It didn't say these are reels. But of course we  
25 looked at the e-data room.

1           But if you recall last May, May 2016, we had  
2 argument on my motion to compel because I made the point  
3 that a lot of my clients would not have claw back exposure  
4 if they were given credit for their profits prior to this  
5 foot strike.

6           And so I've always been asking for these records.  
7 And as you, I'm sure you remember Ted Jacobs represented to  
8 the Court that everything had been produced and was the --  
9 in the e-data room. And he was bragging about how proud he  
10 was of how complete the e-data room was.

11           So now of course we realize the e-data room is not  
12 complete and it -- it's not -- you know, to say at this  
13 point when they've been hiding this evidence for eight  
14 years, to say that they should just give me the microfilm  
15 reels when we're talking about this enormous massive  
16 documents and we don't really know everything that's on  
17 them. That little label done by the vendor is not  
18 satisfactory to assure us of everything that's on each reel.

19           If I get the microfilm reels, first of all, it's  
20 not manageable for me. I mean, we're talking about probably  
21 15 million pages of documents.

22           Number two, the trustee's going to have to put  
23 them in a readable, searchable format for himself anyway  
24 because he's going to have that expense anyway because how  
25 do you -- they won't be Bate stamped. If I go to trial and

Page 49

1 I have a document what am I going to do? I'm going to say,  
2 it's from microfilm reel screen number 178, you know, from  
3 reel -- it's not manageable.

4 In addition to which without it being searchable  
5 when you're talking about 50 million pages of documents it's  
6 as good as saying, you're not entitled to the evidence.

7 THE COURT: You know, I remember going on document  
8 reviews when I was a young lawyer. We didn't have digitized  
9 documents. We looked at the documents --

10 MS. CHAITMAN: Judge --

11 THE COURT: -- and made copies of what we wanted.

12 MS. CHAITMAN: -- I doubt very much that you had  
13 50 million pages of documents.

14 THE COURT: Actually, I probably did in the --

15 MS. CHAITMAN: Okay.

16 THE COURT: -- first case I did.

17 MS. CHAITMAN: And was your adversary someone who  
18 had been paid a billion dollars in a case that involves 64  
19 billion and where your adversary made representations for  
20 eight years that everything had been produced --

21 THE COURT: Okay.

22 MS. CHAITMAN: -- and now our hands are going to  
23 be tied because we don't have the financial wherewithal to  
24 prove how dishonest the trustee has been.

25 THE COURT: All right. Look, I don't have a

Page 50

1 motion before me. And I think that Sage is a slight -- is  
2 in a different position than Ms. Chaitman's clients because  
3 they can identify specific instructions and I think you  
4 ought to deal with that issue about whether or not you can  
5 produce the corresponding trading records for that day or  
6 whatever it is, that it's supposedly shows up on his account  
7 statements and then he can compare trading records with  
8 account statements.

9 With respect to the 4,700 boxes, you're not going  
10 to convince me to simply force the trustee to turn them  
11 over. You're going to have to make a showing through a  
12 motion or through negotiation.

13 What I would suggest since you're also appear to  
14 be suspicious about the labeling or not suspicious, dubious  
15 of its accuracy, is pick a small representative example, 20  
16 reels, digitize them and then you can show me why these are  
17 relevant or how these are relevant. If I look at the sample  
18 and you don't show it to me, then you'll have to pay for  
19 whatever it's going to cost. It's essentially a cost  
20 shifting issue and a relevance issue, I suppose.

21 That's how I would suggest you deal with it in the  
22 short term. but otherwise you can make a motion to compel  
23 discovery. But he's going to come back and say, they're  
24 irrelevant, but if you really want to look at them you pay  
25 for it. And it's going to be the same issue.

Page 51

1 MS. CHAITMAN: Then I would suggest, Your Honor,  
2 that you require the trustee to give me all the microfilm  
3 and I will go through that process and try to do it myself  
4 because I don't want to be in a position --

5 THE COURT: So you'll pay for it?

6 MS. CHAITMAN: No. He's just going to give me the  
7 microfilm. He's not going to digitize it.

8 THE COURT: Well, he has to copy it --

9 MS. CHAITMAN: He doesn't have that.

10 THE COURT: He has to copy it.

11 MS. CHAITMAN: Well, he can certainly afford to  
12 copy --

13 THE COURT: I think my suggestion is better. Look  
14 through the list, pick a small representative sample, 20  
15 reels, look through the reels. You can -- I assume you're  
16 going to look at reels that correspond to dates in your  
17 customers' statements if you're talking about treasury bills  
18 or treasury trading to see if you can make a connection  
19 because that's really what we're talking about.

20 MS. CHAITMAN: No, it isn't.

21 THE COURT: Well, that's what I understand it to  
22 be --

23 MS. CHAITMAN: No.

24 THE COURT: -- because there's no --

25 MS. CHAITMAN: Can I correct that?

1                   THE COURT: Well, my understanding from what I've  
2 heard is that the BLMIS other aspects of the business were  
3 always engaged in actual transactions. They just weren't  
4 allocated to customers. They were for BLMIS. And your  
5 argument is that they were allocated because there are  
6 corresponding entries in the customer statements where they  
7 should have been allocated. Isn't that what you're arguing?

8                   MS. CHAITMAN: There are different arguments.  
9 With respect to the treasury, I can match up based on Mr.  
10 Madoff's testimony as to where the treasuries were I can --  
11 and he testified that all of those treasuries, I didn't  
12 realize it was 16 billion as Mr. Sheehan said. Those were  
13 purchased with 703 account money. Mr. Madoff testified --

14                  THE COURT: Wasn't that just because he was  
15 putting the cash into treasury bills to get more interest?

16                  MS. CHAITMAN: No, because he had -- he had money  
17 -- he held them to term. He held them to maturity. They  
18 showed up on customer statements. And they were at Bear  
19 Sterns. They were at Fidelity. They were at Lehman  
20 Brothers. They were at Morgan Stanley.

21                  But that's an issue post-1992. I'm focusing on  
22 the 1980s, and what we've already found from the 450 odd  
23 reels that were produced is we can show that the convertible  
24 bond trading of our customers was supported by the ownership  
25 of the securities that their statements showed they had.

Page 53

1 THE COURT: All right. Well, you can --

2 MS. CHAITMAN: But we've only gotten a small  
3 portion of those. I showed -- I included those in my  
4 submission to Your Honor before the last -- I -- there were  
5 NCSS statements which Mr. Sheehan has conceded are  
6 legitimate and there were National Bank of North America and  
7 National Westminster Bank statements. And I assume they  
8 were generated the same way. Computers were linked up and  
9 they could be printed out by Madoff of what was being held  
10 in custody.

11 So, you know, we've already established that these  
12 documents prove that there was real trading done for the  
13 customers. Now obviously that's going to be determined by  
14 the fact finder, but we've only gotten a sliver of the  
15 documents. That's why --

16 THE COURT: Well, you can show that in a motion to  
17 compel discovery. There are a lot of issues that are  
18 involved with cross-shifting. If you can convince me that  
19 there's gold or that there may be gold in these unproduced  
20 documents, then, you know, fine.

21 MR. SHEEHAN: Your Honor, I know you don't want to  
22 hear more from me, but I just wanted to add one thing.

23 THE COURT: Yeah. I'm just -- you know --

24 MR. SHEEHAN: No. I don't want to argue. I just  
25 want to -- a point of clarification. It's our position that

Page 54

1 Ms. Chaitman has all of the 1992 tapes, '92 and prior.

2 THE COURT: Pre-'92?

3 MR. SHEEHAN: Yes. At least according to the  
4 markings on them and the --

5 THE COURT: Well, you know --

6 MR. SHEEHAN: -- stuff we've found. So --

7 THE COURT: -- if she makes a motion for it, you  
8 just give me an affidavit saying they've all been produced.

9 MR. SHEEHAN: All right. Fine, Your Honor.

10 THE COURT: You don't have --

11 MR. SHEEHAN: Fine. Okay. I just want --

12 THE COURT: Because there's no point --

13 MR. SHEEHAN: -- to be clear.

14 THE COURT: -- there's no point in arguing back  
15 and forth about that.

16 MR. SHEEHAN: No. I understand.

17 THE COURT: Now with respect to Sage, you may be  
18 able to work out something to get the --

19 MR. SHEEHAN: We'll actively try that, Your Honor.

20 THE COURT: -- records that correspond to the  
21 trading directions that were being sent over the years.

22 MR. SHEEHAN: Yes, Your Honor.

23 THE COURT: It certainly sounds relevant and --

24 MR. SHEEHAN: No question, Your Honor. And we  
25 will do that.

1 THE COURT: All right.

2 MR. KRATENSTEIN: Thank you, Your Honor.

3 THE COURT: All right. And give me the order for  
4 the second day. Let's complete that deposition and schedule  
5 a trial.

6 MR. SHEEHAN: Thank you, Your Honor.

7 THE COURT: All right. Thank you.

8 (Proceedings concluded at 11:09 a.m.)

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Page 56

1                           I N D E X

2  
3                           R U L I N G S

4

5                           IDENTIFICATION                           PAGE

6                           N/A

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Page 57

1 CERTIFICATE

2

3 I, Sherri L. Breach, certify that the foregoing  
4 transcript is a true and accurate record of the proceedings.

5

Sherri L.  
Breach



Digitally signed by Sherri L  
Breach  
DN: cn=Sherri L Breach, o, ou,  
email=digital1@veritext.com,  
c=US  
Date: 2017.08.09 16:18:56 -04'00'

6

7

8 Sherri L. Breach

9 AAERT Certified Electronic Reporter & Transcriber CERT\*D-397

10

11

12 DATE: July 27, 2017

13

14

15

16

17

18

19

20

21

22 Veritext Legal Solutions

23 330 Old Country Road

24 Suite 300

25 Mineola, NY 11501